Co., 40 Mich. 203, 8 Cent. L. J. 297. It has been held that such mortgages are wholly void, even as between the parties to them. *Price* v. *McComas*, 21 Neb. 195, 31 N. W. 511. The Kentucky decision is supported by *Oxsheer* v. *Watt*, 91 Tex. 124, 41 S. W. 466, 66 Am. State Rep. 863, and by a dictum in *Brittain Dry Goods Company* v. *Blanchard*, 60 Kan. 263, 56 Pac. 474; *McCormick* v. *Reynolds* (1901), 62 Neb. 892. The holding of the court in the Kentucky case is based on the reasoning found in the following: *Heyward's Case*, 2 Coke on Littleton, 145; BACON'S ABRIDGMENT, "*Election*" (B); *Mervyn* v. *Lyds*, Dyer, 91; *Woffard* v. *McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Call* v. *Gray*, 37 N. H. 428; *Oxsheer* v. *Watt*, 91 Tex. 124. Excepting the last two, however, these authorities are dicta apparently, and with the exception of the last named case go no further than to hold this class of mortgages valid as between the parties to them. Such holding is grounded upon the doctrine that the grant shall be taken most strongly against the grantor; that the grantor impliedly invests his grantee, in such cases, with the right to select the stated number or quantity from the greater. Here the selection makes the mortgage good. See *Call* v. *Gray*, 37 N. H. 428, 75 Am. Dec. 141, where the court observes that the question is not as to the whereabouts of the title, but as to the effect of the mortgage. But to hold, with the Kentucky court, that a mortgage of this kind is good against third parties subsequently acquiring adverse rights in the mortgaged property, before such property has been identified, seems to the courts, generally, to be an unwarrantable extension of the "doctrine of election," inconsistent with fundamental requirements of the law—for example, the rules in analogous cases in the Law of Sales. By these courts it is thought that the doctrine as so extended is unsound because of probably resultant fraud, uncertainty, and diversity of interests and consequent discouragement of trade. See *Richardson* v. *Alpena Lumber Co.*, 40 Mich. 203. This uncertainty is apparent in the Kentucky reasoning as follows: "Purchasers would be entitled to at least the average of the whole, or maybe to themselves have choice, leaving enough of the average of the whole to satisfy the mortgage."

CONSTITUTIONAL LAW—POSSESSION OF GAME FISH IN CLOSED SEASON.—Laws 1902, c. 194, § 141, prohibits the possession during the closed season of trout taken outside the state. Action brought to recover penalties under above section of the forest, fish, and game law. Defendant, a foreign corporation extensively engaged in the fish business, imported into the United States from Canada trout in August, 1902, stored the same in cold storage, and in February shipped some of them to a dealer in Schenectady. The trout were imported with other fish in a regular boat licensed by the United States to carry freight between this country and Canada, were duly reported passed through the U. S. customs house, and duties were paid. *Held*, that § 141 of the game law, prohibiting the possession of game fishes caught outside the state of New York is void as depriving the citizen of the rights of property and liberty guaranteed by the state constitution. *People* v. *A. Booth & Co.* (1903), — N. Y. —, 86 N. Y. Supp. 272.

The question of the right of possession of certain fish during the closed season came up in *People* v. *Buffalo Fish Co.*, 164 N. Y. 93, 58 N. E. 34, 52 L. R. A. 803, but the statute there in controversy was held to apply only to fish taken in the waters of the state. So long ago as *Phelps* v. *Racey*, 60 N. Y. 10, it was held in New York that the legislature had full power to prohibit the possession of game during the closed season even though brought from another state, and this opinion is sustained in *People* v. *O'Neil*, 110

Mich. 324, 68 N. W. Rep. 227, 33 L. R. A. 696, *Ex parte Maier*, 103 Cal. 476, *Haggerty* v. *Ice Co.*, 143 Mo. 238, *Roth* v. *State*, 7 Ohio Cir. Ct. 62, *Magner* v. *People*, 97 Ill. 320. In *Geer* v. *Connecticut*, 161 U. S. 519, it was held that no person should have in possession game with the intention of conveying it beyond the limits of the state. In *People* v. *Van Pelt*, 130 Mich. 621, 90 N. W. Rep. 424, and in *Peters* v. *State*, 96 Tenn. 682, 36 S. W. Rep. 399, 33 L. R. A. 114, it is held that the legislature may control the taking of game by a person upon his own lands.

CONSTITUTIONAL LAW—SPECIAL ACT—SUNDAY LAW.—Chapter 362, Laws 1903, prohibits the keeping open of butcher shops for the sale of meats on Sunday, but authorizes tobacco, fruits, and confectionery to be sold in an orderly manner on that day. Defendant was convicted of violating the statute which he contended was class legislation. *Held*, not to be such an unreasonable discrimination between these several occupations as to invalidate the law for violation of Art. 4 of the constitution prohibiting special or class legislation. *State* v. *Justus* (1904), — Minn. —, 98 N. W. Rep 325.

Sunday statutes have been sustained as constitutional almost without exception, the most notable instance to the contrary being *Ex parte Newman*, 9 Cal. 502, which is now overruled by the courts of that state, *Ex parte Koser*, 60 Cal. 202. The general theory is that one day's rest is necessary to the health of most individuals, not all of whom possess the power to observe a day of rest of their own volition, and hence the law that only works of necessity or charity be permitted. *People* v. *Bellet*, 99 Mich. 157, *Barbier* v. *Connolley*, 113 U. S. 27, *People* v. *Havnor*, 149 N. Y. 195, *Com.* v. *Waldman*, 140 Pa. St. 89, *Ungricht* v. *State*, 119 Ind. 379, *State* v. *Fridench*, 45 Ark. 347. The peculiarity in the above holding is considering the sale of tobacco a necessity and the sale of meat a misdemeanor. If a man may be required to buy his meat Saturday night, would it be a hardship to require him to buy his tobacco at the same time? Another striking instance of the inclination of this state toward class legislation is exemplified in *Dike* v. *State*, 38 Minn. 366.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—IMPLIED CONDITION — By a contract in writing, the defendant agreed to hire from the plaintiff a flat for two days, on which days it had been announced that the Coronation processions would take place and pass the said flat. The contract contained no express reference to the Coronation processions, nor to any other purpose for which the flat was taken. A deposit was made, but as the processions did not take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent. *Held*, that the plaintiff could not recover. *Krell* v. *Henry* [1903], 2 K. B. 740.

The court held that from necessary inferences drawn from surrounding circumstances recognized by both contracting parties, the taking place of the processions on the days originally fixed, along the proclaimed route, was regarded by both contracting parties as the foundation of the contract: that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently, that the plaintiff was not entitled to recover the balance of the rent fixed by contract. The court applies the rule laid down in the leading case of *Taylor* v. *Caldwell*, 3 B. & S. 826. This ruling, to the effect that a contract which contemplates the continued existence